

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**FERNANDO G. SANDOVAL**

Claimant

VS.

**CARGILL MEAT SOLUTIONS CORPORATION**

Respondent

AND

**AMERICAN INTERNATIONAL SOUTH  
INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,038,673

**ORDER**

Claimant and respondent appeal the April 21, 2010, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded a 5 percent permanent partial whole person disability for injuries suffered on January 4, 2008. Claimant's award was limited to a whole person functional impairment under K.S.A. 44-510e as claimant continues working for respondent at a comparable wage.

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board notes that the Award of the ALJ was filed with the Workers Compensation Division (Division) on April 21, 2010. The appeal of the claimant was not filed until May 28, 2010, and the appeal of the respondent was not filed until June 4, 2010. Neither appeal meets the 10-day limit set forth in K.S.A. 2009 Supp. 44-551(i)(1). At oral argument to the Board, the parties stipulated that the new system recently adopted by the Division, requiring the administrative law judges to e-mail awards to the parties without benefit of United States mail, had resulted in the Award in this matter not reaching the parties. The Docket Report maintained by the Division contains an entry on May 27, 2010, showing scanner problems resulting in the Award being faxed to the attorneys on May 27, 2010. Neither party disputed the fact that there was a serious delay

in the delivery of this Award. The Board acknowledges that the right to appeal is purely statutory in nature. However, certain due process elements must be met, including notice of the award reasonably calculated “to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections.”<sup>1</sup> Based on the policies set forth in *Johnson* and *Nguyen*,<sup>2</sup> the Board determines that it has jurisdiction of the appeal and will allow the parties to proceed with argument in this matter, notwithstanding the lateness of the appeals. The Board heard oral argument on August 11, 2010.

### ISSUE

What is the nature and extent of claimant’s injuries suffered while working for respondent on January 4, 2008? Claimant contends that he is entitled to an award of from 7.5 percent to 10 percent to the whole person, based on the opinion of board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D. Respondent contends that the opinion of board certified neurological surgeon Paul S. Stein, M.D., that claimant has no permanent impairment, is the most credible opinion in this record.

### FINDINGS OF FACT

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant suffered an accidental injury to his low back on January 4, 2008. This is not in dispute. Claimant alleges that he was symptom free before this date and has continued to have symptoms since. Claimant has been examined and treated by several health care providers as the result of this accident. However, the opinions of only two health care providers were placed in this record. Dr. Murati examined claimant on April 21, 2009, at the request of claimant’s attorney. At that time, claimant had complaints of numbness in both legs, worse at night, and low back pain which increased with heavy lifting. He diagnosed claimant with right SI joint dysfunction and low back pain with signs of radiculopathy. He rated claimant pursuant to the fourth edition of the *AMA Guides*<sup>3</sup> at 10 percent to the whole person, citing the DRE category III as being proper with claimant’s symptoms of radiculopathy. Dr. Murati acknowledged that he reviewed the January 24, 2008, report of Dr. Terry Hunsberger which indicated positive

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<sup>1</sup> *Johnson v. Brooks Plumbing*, 281 Kan. 1212, Syl. ¶ 4, 135 P.3d 1203 (2006).

<sup>2</sup> *Id.*; *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Waddell's signs during Dr. Hunsberger's examination of claimant. Dr. Murati agreed that positive Waddell's signs indicated an unreliable examination. However, Dr. Murati testified that all the Waddell's signs were negative during his examination of claimant.

Claimant was referred to Dr. Stein by the ALJ on two occasions. The first examination was on September 9, 2008. Claimant was diagnosed with persistent low back pain without radicular features. X-rays of the lumbar spine were negative, and the physical examination was negative except for low back tenderness and some overreaction. Dr. Stein noted the finding of positive Waddell's signs during the examination by Dr. Hunsberger. An MRI was recommended and performed on October 20, 2008. The MRI identified mild desiccation at L2-3 and degenerative changes at L5-S1 of a moderate degree. A mild disk bulge was also identified at L5-S1 on the left side. Epidural injections were recommended along with physical therapy for one month. If no relief was reached and if claimant was willing, a possible discography would then be discussed. Lumbar x-rays read on January 8, 2009, indicated no instability and did not change Dr. Stein's opinion.

Claimant was referred back to Dr. Stein on September 24, 2009, by the ALJ. Claimant reported the same symptoms as before with pain in the low back and into the right anterior thigh to the knee and the right inguinal region. There was also numbness and tingling in the right foot. The physical examination identified an unusual gait which Dr. Stein had problems identifying. Claimant's range of motion in the lumbar spine was considerably restricted. However, Waddell's passive rotation and axial compression tests were positive. Pinprick testing in the right lower extremity manifested non-anatomic and non-physiologic sensory results. Because of the strong signs of symptom magnification, Dr. Stein considered rating claimant under DRE category I with a zero percent impairment. However, due in part to the objective degeneration at L5-S1, he determined that claimant was in DRE category II and rated claimant at 5 percent to the whole person, pursuant to the fourth edition of the *AMA Guides*.<sup>4</sup> Dr. Stein found no signs of radiculopathy which would allow claimant to be rated under DRE category III.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

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<sup>4</sup> *AMA Guides* (4th ed.).

<sup>5</sup> K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>7</sup>

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>8</sup>

Claimant argues entitlement to an award of either 7.5 percent based upon a split of the opinions of Dr. Murati and Dr. Stein or 10 percent to the whole person based on the opinion of Dr. Murati. Respondent contends claimant has no permanent impairment and is malingering or attempting to misrepresent his level of impairment. Both positions can be supported in this record. It is uncontested that claimant suffered an accidental injury which necessitated medical treatment. The objective tests performed, including the MRI and x-rays, displayed definite degeneration and a mild disc bulge. Dr. Stein, the court appointed IME doctor, rated claimant at 5 percent to the whole person, although that opinion was provided reluctantly. Dr. Murati rated claimant at 10 percent, in part due to radiculopathy, a finding shared by no other health care provider in this case. Additionally, the MRI findings did not support the argument that radiculopathy actually existed with this claimant. Plus, claimant was positive with at least two of the Waddell's tests, an indication of exaggeration which Dr. Stein noted as troubling. The ALJ found the medical opinion of Dr. Stein that claimant has a 5 percent whole person functional impairment to be the most persuasive. The Board agrees and affirms same.

### CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered an accidental injury on

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<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>8</sup> K.S.A. 44-510e(a).

January 4, 2008, resulting in a 5 percent permanent partial whole body disability on a functional basis. The Award of the ALJ is affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated April 21, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge